

**LETTER OPINION
2002-L-32**

June 5, 2002

Mr. Mark D. Bachmeier
Commissioner of Labor
State Capitol
600 E Boulevard Ave Dept 406
Bismarck, ND 58506-0340

Dear Mr. Bachmeier:

Thank you for your letter asking about the application of amendments to N.D.C.C. § 14-02.4-21. The amendments changed the status of certain records under the open records law. Your question concerns the release of records created before the effective date of the amendments.

Previous law provided that a complaint received by the Department of Labor and any information obtained during an investigation were exempt from the open records law before the institution of judicial proceedings under chapter 14-02.4. N.D.C.C. § 14-02.4-21 (1997)

The amendments in question were enacted in 2001 S.B. 2217, effective August 1, 2001. Several changes were made regarding the status of records in your office. For instance, a complaint received by your office is now an open record rather than exempt for a period of time as previously provided. N.D.C.C. § 14-02.4-21. The new law also states that information obtained during an investigation under the chapter is exempt from N.D.C.C. § 44-04-18 before the institution of judicial proceedings, before your office conducts an administrative hearing under the chapter, or before your office administratively closes a complaint. Id. This implies that the record is open after any of those events, while the law previously stated that this information was exempt until the institution of judicial proceedings only.

The North Dakota Supreme Court has not addressed this specific issue, but this office has addressed the question in other contexts. In 1992, this office considered a question about the application of the attorney work product exemption¹ for attorney work product

¹ N.D.C.C. § 44-04-19.1.

that was prepared before the effective date of the statute. The issue was resolved by determining that, upon the effective date of the law exempting attorney work product from the open records law, all attorney work product then in existence was exempt from disclosure whether prepared before or after the effective date of the new law. 1992 N.D. Op. Att'y Gen. F-04. In 2001, this office stated:

In determining whether an application of a statute would be retroactive, one must look at the conduct regulated by the statute. Because a new or amended statute expanding or restricting access to public records “deals with the availability of public records, not the recordation function of government units,” a public entity’s response to an open records request is not governed by the law in effect when the requested records were created, but rather by the law in effect on the date the entity is required to respond to the request.

2001 N.D. Att’y Gen. O-12 (citation omitted).

Courts of other states also have held that the law in effect at the time a request for the records is made governs the availability of records rather than the law at the time the record was made. The Supreme Court of Hawaii held that amendments to its Uniform Information Practices Act applied to records which were in existence before the effective date of the amendments. The Court noted that the Act affects only an agency’s prospective duty of disclosure and impairs no existing rights,² and therefore the amendments to the Uniform Information Practices Act were not applied retroactively. State of Hawaii Organization of Police Officers v. Society of Professional Journalists - University of Hawaii Chapter, 927 P.2d 386, 397 (Haw. 1996). The Supreme Court of Ohio considered amendments to its open records law relating to disclosure of law enforcement records in existence prior to the effective date of the amendments. The Court noted that its amended law related to all public records and made no distinction for records compiled before or after the effective date. The Court also noted that the newspaper in question was not seeking to apply the statute in a retroactive manner, but was instead seeking present access to the records. The Court stated that even though the records sought were created prior to the amendment to the statute, the creation of the records was not the subject being regulated by the open records statute. The Court said:

² The amendments in question do not impair any vested rights because complaints were merely exempt from the open records law, not confidential, and therefore still subject to being made public, or the records were otherwise going to become open at different times. Further, these records were not obtained under a specific promise of confidentiality. At most, a person would have had a mere expectation that the law would not be changed, which does not create a vested right. See Fairmount Township, 431 N.W.2d at 295.

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R.C. 149.43 deals with the availability of public records, not the recordation function of governmental units. The date the records were made is not relevant under the statute. Since the statute merely deals with record disclosure, not recordkeeping, only a prospective duty is imposed upon those maintaining public records.

State ex rel. Beacon Journal Pub. Co. v. University of Akron, 415 N.E.2d 310, 313 (Ohio 1980). For similar holdings, see News-Press Pub. Co., Inc. v. Kaune, 511 So.2d 1023 (Fla. Dist. Ct. App. 1987), and Industrial Foundation of the South v. Texas Industrial Accident Bd., 540 S.W.2d 668 (Tex. 1976).

Nothing in the amendments to N.D.C.C. § 14-02.4-21 shows a legislative intent to apply the amendments to only records received after its effective date. It is my opinion that the 2001 amendments to N.D.C.C. § 14-02.4-21 apply to your department's prospective duty of record disclosure. Thus, complaints received under N.D.C.C. ch. 14-02.4 are open records whether they were received before or after August 1, 2001. Similarly, information obtained during an investigation conducted under the chapter is exempt from N.D.C.C. § 44-04-18 before the institution of any judicial proceedings, administrative hearing proceedings under the chapter, or before administrative closure of a complaint by the department. The status of these records will be governed by the applicable provisions in N.D.C.C. § 14-02.4-21 whether those events occurred before or after August 1, 2001.

Sincerely,

Wayne Stenehjem
Attorney General

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